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LABOR LEGISLATION FOR THE AIRLINES*

BY ARTHUR M. WISEHART†

IN HIS comments yesterday, Mr. Kay McMurray of the Air Line Pilots Association recalled an incident which he regarded as a complete answer to the arguments in favor of arbitration. Apparently Mr. McMurray and a young lady had been arguing the pros and cons, and the young lady remained unconvinced. Mr. McMurray thereupon asked her the following question: "If I were to proposition you, would you agree to arbitrate?"

The answer is not as self-evident, however, as Mr. McMurray seems to think. For the analogy to fit the airline situation, Mr. McMurray's proposition must be regarded as being in the nature of a bargaining proposal made by a union, and the young lady, of course, is an airline receiving the proposal. To make the analogy complete, the young lady has twelve brothers and sisters dependent upon her (*i.e.*, the airline's other employees and its customers and stockholders), and, when Mr. McMurray makes his proposition, he is holding a knife at her throat (*i.e.*, the power to strike). With such an imbalance in bargaining power, the answer to "Would you arbitrate?" understandably might be quite different than Mr. McMurray imagines, and it is difficult to imagine any arbitrator who would not protect the young lady's honor.

A recent article sets forth my proposal for amending the Railway Labor Act to control transportation strikes.¹ Under the proposal, the responsibility for determining whether an airline labor dispute, or any part of it, should be submitted to arbitration would be transferred from Congress to the emergency boards. In deciding whether a dispute should be arbitrated, the emergency board would be guided by two important criteria: The effect of the threatened strike on the public, and the prospect for settlement by collective bargaining. If an emergency board were to determine that a dispute should be arbitrated, the parties would be given a reasonable period of time to agree upon acceptable arbitrators and procedures. If the parties should fail to do so, the emergency board would prescribe the terms of arbitration. Thus, it should be possible to (i) restore emergency boards to the effectiveness originally contemplated; (ii) eliminate what has been described as one-sided compulsory arbitration in which the carriers, regulated by the government, are virtually compelled to accept emergency

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¹ Wisehart, *Transportation Strike Control Legislation: A Congressional Challenge*, 66 MICH. L. REV. 1697 (1968).

board recommendations which the unions can ignore with impunity; (iii) give collective bargaining a better chance to work by strengthening mediation; (iv) relieve Congress from the necessity of reviewing the merits of labor disputes on an ad hoc basis; and (v) place in the hands of disinterested experts the delicate question of whether the nature of the dispute and the public interest are such as to require third-party determination.

While I will gladly discuss any questions about the proposal, my plan is to analyze the *need* for limiting strikes in transportation. Once the need is generally recognized, the means to satisfy the need will not seem so elusive. The first step in solving an intractable problem is the seemingly simple, but often most difficult, matter of recognizing that the problem exists. This fact is reflected in Step One of the Alcoholics Anonymous program, which is an admission that "... our lives had become unmanageable." So let us look at the question, "Have transportation strikes become an unmanageable disease—is there a need to curtail them?"

I. DO TRANSPORTATION STRIKES CREATE AN EMERGENCY?

The argument is frequently heard that transportation strikes create no true emergency, and that limiting them is therefore unwarranted. Whether such strikes create an emergency, of course, depends upon how "emergency" is defined. What may be an emergency to one is a tea party to another. I remember hearing some who had been personally affected by the five-airline strike in 1966 bravely insist that it was not an emergency so far as *they* were concerned. On the other hand, there were others who believed that the grounding of 6,450,000 passengers and the elimination of 70 percent or more trunkline service for 43 days from over 300 cities in the United States, in the midst of Vietnam, if not an emergency, was a luxury we could ill afford. It is estimated that a strike of the same five carriers in 1970 would inconvenience 10,000,000 and 15,000,000 passengers in 1975.²

In Sweden the problem of defining an emergency was solved in an interesting way. To forestall the enactment of restrictive legislation against strikes, the two confederations of management and labor entered into a basic agreement for the control of disputes, and the framework established by that basic agreement remains in effect today.³ In drafting the basic agreement, one of the most serious problems was defining an emergency strike. After much fruitless debate, those responsible did a very practical thing. They concluded that no definition could be made which would both be objective and win general acceptance. They said that the need for restricting strikes in the public interest is directly dependent upon the circumstances of each case, a concept not foreign to the common law, so they established a Labor Market Board to assess the facts of each case as it comes up. If the Board concludes that a given dispute threatens

² Statement of Everett M. Goulard, Vice President—Industrial Relations, Pan American World Airways, before the Special Committee on National Strikes in the Transportation Industries of the American Bar Association, May 5, 1967, p. 10.

³ See SCHMIDT, *THE LAW OF LABOUR RELATIONS IN SWEDEN* 263 (1962).

the public interest, then the confederations of management and labor cooperate in defusing the threat.

The Swedish experience illustrates that we need not throw up our hands in hopeless dismay simply because of lack of agreement in defining what constitutes an emergency. A reasonably adequate procedure for making such determinations as each situation arises can be established, and I think that my proposal in the *Michigan Law Review* does that.

II. WHAT ARE THE COSTS OF A TRANSPORTATION STRIKE?

It may be that there will be no repetition of the 1966 airline strike. The IAM has gone back to the strategy of striking one carrier at a time, the strategy which led to the demise of Capital Airlines in 1958. And the rail unions, faced with ad hoc arbitration legislation whenever a national rail strike is threatened, are also adopting the whipsaw tactic of carrier-by-carrier strikes. But a strike against a single airline such as American, United, or TWA today is equivalent to a strike against the whole industry in 1954. And the New York transit strike by the Transport Workers Union in 1966, demonstrates that a transportation strike need not be national in scope to have serious consequences for the entire nation. That strike, in a transit system in which advances in productivity have been virtually non-existent, brought the City of New York to its knees and extorted a settlement which at that time was unprecedented (three 5 percent wage increments over a period of 18 months).

The New York transit strike established a pattern which a rival union, the IAM, could not ignore when the time arrived for settling the open mechanics' contracts on five airlines later in the year. The IAM took full credit for shattering the Presidential guidelines in the aftermath of its 43-day strike and was criticized for having done so:

The settlement, which has just been ratified by the International Association of Machinists, will raise the compensation of its members by an average of 4.9 percent a year, not by the 6 or 8 percent a year which some reports have inaccurately claimed. In addition, there is a provision for limited cost of living escalation, effective during the last 12 months of the three-year contract.

The Council [of Economic Advisors] greatly regrets that its settlement so substantially exceeds its guideposts for non-inflationary wage behavior. It regrets the unwillingness of the Machinists' Union to accept the reasonable and responsible settlement of this dispute recommended by the President's emergency board, or even the somewhat higher settlement which the union's representatives negotiated on July 29.⁴

The strategy of the 1966 IAM strike was aptly summarized by C.A.B. Examiner Arthur S. Present in the Initial Decision approving, for the third time, the Mutual Aid Agreement. He said:

The real goal of IAM in this controversy appears to have superseded immediate objectives peculiar to the airline industry. Thus, IAM, with a total

⁴ Statement of August 22, 1966, by Gardner Ackley, Chairman of the President's Council of Economic Advisers.

membership of approximately 1,025,000, only 68,000 of whom are employed in the air transport industry, strove to demolish the President's Wage-Price Guidelines and succeeded in doing so.⁵

But in fact, the guidelines had already been demolished by the TWU's transit settlement. And, as a practical matter, with the TWU representing the mechanics of two other airlines, American and Pan American, the IAM could do little but follow suit. The IAM settlement approximated the increase in the New York transit settlement, as did the subsequent American and Pan American settlements. The pattern was carried over into the railroad shop craft negotiations, and spread from there to other parts of the economy.

Thus public interest is not to be weighed only in terms of the effect of the transit strike on the City of New York, or the effect of the five-airline strike in grounding millions of passengers and tons of airfreight, or the harm which would have resulted from a national rail strike.⁶ Far more serious was the disabling effect of inflation on the economy. Workers winning a collective bargaining "victory" in 1966 of a 5 percent increase for 1968 (at a loss in earnings of about \$900 for each employee participating in the 43-day strike) might well wonder whether it was not a Pyrrhic victory when considering that the net differential between their increase and the ensuing 4.7 percent increase in the Consumer Price Index for 1968 was only .3 of 1 percent. As Mr. Gardner Ackley, while chairman of the Council of Economic Advisors, prophetically said:

Efforts by the Government to curb inflationary pressures and maintain steady economic growth cannot achieve their objectives if business and labor continue to agree on wage and benefit increases that far outrun our ability to produce the additional goods and services on which higher incomes can be spent.

Other unions that are in the process of formulating bargaining demands and other employers who are entering labor negotiations or setting prices must remember that higher wages and profits beyond those justified by productivity trends can only be collected by reducing the real incomes of all Americans. *The efforts of others to protect themselves from such reductions by excessive increases in their own wages and prices will in the end destroy the initial gains of those who started the process* [Emphasis added.].

And the forces set in motion by these inflationary settlements have yet to be contained. It remains to be seen how disagreeable the hangover will be. The Committee for Economic Development recently released a study which is hopeful that fiscal and monetary "fine tuning" will stem inflation. However, its conclusion presupposes (i) the subsidence of Vietnam; (ii) no similar conflict arising in its place; (iii) an end to inflationary wage increases; and (iv) the acceptability of high interest rates and taxes. Inflation can be mitigated by increased unemployment, but unemployment entails its own problems. The nation loses the productive labor which could be contributed by the unemployed, and the damaging

⁵ Mutual Aid Agreement (Renewal), Doc. 9977, Initial Decision, March 7, 1969, p. 36.

⁶ Ad hoc arbitration legislation was enacted to end the threat of a national rail strike. 81 Stat. 122 (1967).

effect on problems of minority employment and urban turmoil is self-evident. An increase of unemployment from last year's rate of 3.6 percent to 4.7 percent would mean almost a million more people out of work.⁷

It has been reported that many of the 1969 settlements exceed the 6.6 percent average wage and fringe gains in 1968 settlements.⁸ In transportation, the Philadelphia transit agreement embodies a 17.1 percent package increase, 9.2 percent of which is for the first year; the New York long-shore settlement is 29.6 percent over three years; and mechanics on Flying Tiger Line received a three-year package worth 28 percent.⁹ The recent American Airlines settlement, naturally, is in the same ball park. With settlements such as these, a great deal of "fine tuning" indeed will be needed to prevent inflationary consequences.¹⁰

III. DO TRANSPORTATION STRIKES CONTRIBUTE ANYTHING OF VALUE TO COLLECTIVE BARGAINING?

I have often wondered what positive contributions transportation strikes could make to collective bargaining that would justify their tremendous economic and social costs. The more I think about that question the more I am convinced that the disadvantages far outweigh any possible advantages.

* * * *

1. Strikes are not needed to bring about organization of employees. Most transportation is highly organized already.

2. Strikes are not needed to enforce collective bargaining. Collective bargaining in transportation is a legally enforceable right of relatively ancient vintage, being the product of statutes which go back to 1888, far antedating labor laws in other fields.

3. Strikes are not attributable to grievances. The Railway Labor Act mandates adjustment boards for grievances and the grievance procedures are highly developed.

⁷ Wall Street Journal, March 26, 1969, at 1.

⁸ S. I. Nakagama of Argus Research Corporation has noted that non-union workers received higher increases in 1967 and 1968 than those represented by unions. The increases negotiated by major unions in those years were 5.6% and 6.6%, respectively, while the increases for all workers (including non-union) were 6.0% and 7.2%. Kraus, *Wage-Price Specter*, New York Times, February 12, 1969, at 53.

⁹ Wall Street Journal, February 18, 1969, at 1.

¹⁰ In separate comments in the report by the STAFF OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, M. C. Turner, Jr., a member of the Research and Policy Committee, stated (p. 34):

I am sure that the Committee gave consideration to the strong inflationary effect of excessive wage and benefit increases, but the statement does not appear to give adequate recognition to this factor. There have been many union agreements in major industry which are far beyond any productivity improvement and, therefore, they are truly inflationary This situation is just as important to recognize as monetary and fiscal measures which are controllable by government and business While nobody would like it, it appears that we must consider the proposal of labor courts and final and binding arbitration.

John Kenneth Galbraith believes that a more extreme remedy will be required:

The American economy, whatever wishful analysis there may be to the contrary, is not stable at or near full employment. Wages will always shove up prices, and prices will always pull up wages, and this spiral will revolve for Republicans and Democrats alike. Moreover, it has been the experience of virtually every other major industrial country that some machinery for wage and price restraint is the only alternative to inflation or heavy unemployment.

4. Strikes are not needed because transportation employees are underprivileged. The rates of pay and fringe benefits received by transportation employees compare favorably with similar employees in any other industry. I could digress here about such facts as the rates effective for the 747 aircraft going into service this year—which, under a TWA Agreement, will produce \$58,000 a year plus about 20 percent more in pension and annuity contributions, or a total of over \$70,000 for airline pilots who have a monthly maximum of 75 hours flight time—or the fact that airline mechanics will be making \$12,000 a year. Meanwhile, the airlines themselves are earning less than half the rate of return that the Civil Aeronautics Board found to be reasonable.¹¹

5. Strikes are not needed to make collective bargaining function properly. Management and labor, in agreeing originally to the terms of the Railway Labor Act, apparently regarded strikes as unnecessary to collective bargaining because it was their understanding that the Act would virtually eliminate strikes. It did so, and collective bargaining on the railroads functioned acceptably for about fifteen years without significant strikes. It was only after World War II that the original understanding was forgotten, and strikes began to afflict the railroads and airlines. The National Mediation Board has described the situation as follows:

Until the wage movements of 1941, the recommendations of emergency boards were commonly accepted by both sides. After the experiences of that year, the pattern changed, and it has become customary to reject rather than accept, the recommendations of emergency boards set up to handle national wage and rules movements . . . since 1941, emergency board recommendations have served only as a base to be used for securing further wage and rule concessions in a final settlement, usually made under Executive auspices.¹²

6. Strikes do not contribute toward a sensible solution of problems.

* * * *

Perhaps it would be easier to defend transportation strikes if one were assured that settlements produced through the strike process were worth waiting and suffering for because they are somehow better. But the opposite would seem to be true. Strike settlements are not the products of a rational, objective process as much as they are the result of lack of sleep, emotionalism, irrationality, and expediency.

Further, strikes are indicative of sickness, not health, in collective bargaining. When they impose more injury on bystanders than on the combatants themselves, why are they permitted? Perhaps it is because of some mystique wrongly attributed to them.

As lawyers we need to eliminate the superstition and expose the reality. We need to substitute a rule of reason for what is now resolved so irrationally. The legal tradition contains ample precedent for such a substitution.

¹¹ The rate of return for the domestic trunk carriers is estimated at 5.3% for 1968; the figure set by the Civil Aeronautics Board as "fair and reasonable" is 10.5%. *General Passenger Fare Investigation*, Doc. No. 8008 (Order No. E-16068), 32 C.A.B. 291, 308-09, 331 (1960).

¹² 17 NMB Ann. Rep. at 33 (1951).

Trial by battle—personal combat—was an accepted method of settling disputes in Norman England. Superficially this system would seem, like strikes, to be based on the morally indefensible premise that "might makes right." However, in the 12th Century, it had a loftier source; *i.e.*, the medieval faith that God would quash the unjust.¹³ As piously intoned by the King in Shakespeare's *Henry VI, Part II*:

What stronger breastplate than a heart untainted!
Thrice is he arm'd that hath his quarrel just,
And he but naked, though lock'd up in steel,
Whose conscience with injustice is corrupted.
[Act III, Scene ii.]

Over the centuries, those with practical experience in the affairs of men inevitably began to develop doubts about the soundness of this proposition. If God would indeed quash the unjust, it must have seemed a curious coincidence that the unjust were always the weaker of the antagonists. A waning enthusiasm for trial by battle led Richard II to banish both disputants—

For that our Kingdom's earth should not be soil'd
With that dear blood which it hath fostered. . . .
[Shakespeare, *Richard II*, Act I, Scene iii.]

The usual cultural lag existed, however, and it was several centuries before perception became settled in practice. Not until 1819 did England do away with trial by battle entirely.¹⁴ This came about as a defense in a celebrated civil case decided by the King's Bench the year before.¹⁵ In an action for damages for the alleged murder of a near relative, when the King's Bench upheld the defendant's right to trial by battle, the plaintiff, "having been further advised," stated that he "prayed no further judgment," and the suit was discharged.¹⁶ Legislation followed.

Prior to 1819, however, alternative procedures to discourage trial by battle were developed. Examples include the jury system and *peine fort et dure*¹⁷ which, literally translated, means "pain strong and hard," and involved piling heavy weights on a contentious party's chest until he either "confessed," or expired. As a device it bears an interesting resemblance to suggestions for the use of "non-stoppage" strikes or seizure in which the action taken is so painful that a party either "settles" or, like the formerly private New York City bus system, expires. *Peine fort et dure* fortunately has not survived, and hopefully punitive strategies to prevent strikes will meet the same fate.

Today we leave many collective bargaining disputes to the modern equivalent of trial by battle. And, if God is not in the picture, I am afraid that the rationale has to be that "might makes right."

¹³ 52 KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 197 (1942): "It was commonly considered unjust to punish men after a verdict obtained by human means when a divine tribunal was available."

¹⁴ *Id.*

¹⁵ See KENDALL, TRIAL BY BATTLE (3d ed. 1818).

¹⁶ *Ashford v. Thornton*, [1818 K.B.] 1 Barn. & Ald. 405, 19 Rev. Rep. 349 (1818).

¹⁷ KNAPPEN, *supra* note 13, at 51.

Thus transportation strikes as a procedure for resolving collective bargaining disputes are the antithesis of due process. They are not the embodiment of the force of reason, but the exaltation of force over reason. We tend to forget that strikes are not a natural right, a part of the social contract. God did not give to the late Michael Quill a stone tablet that said, "I grant you and your union the right to strike," nor did the founding fathers mention this right in the Constitution.¹⁸

Because the law at present fails to establish an equal balance of power between labor and management, those unions which strike to settle disputes are so rewarded, at the public's expense, that no aspiring union leader or competing union dares ignore the example. Thus the law today not only tolerates strikes but, contrary to its stated purposes, actively encourages them.

It is romantic to suppose that what we have for settling labor disputes in our industry is a system of collective bargaining. What we have instead is a system of strikes. Like the natives organizing a corporation as a form of government in Gilbert and Sullivan's "Utopia, Limited," we go through the ritual of bargaining, but not the substance, waiting only until the power to strike becomes available as the determinant.

When one considers the actual usefulness those marathon talkathons may have, in which endless words are ritualistically offered up apparently only to appease the wrath of the gods, one is reminded of the following bit of dialogue between father William and his son:

"You are old," said the youth, "and your jaws are too weak
For anything tougher than suet;
Yet you finished the goose, with the bones and the beak—
Pray, how did you manage to do it?"

"In my youth," said his father, "I took to the law,
And argued each case with my wife;
And the muscular strength, which it gave to my jaw,
Has lasted the rest of my life."¹⁹

There may be some among you who think that this exaggerates the case. To make the point clearer, I could refer to statements made frankly by union representatives in the privileged vicinity of the bargaining table, but this is not necessary. The bankruptcy of collective bargaining in transportation, the futility of pretending it exists, and the complete absence of the balance of power which is supposed to nurture it, are all reflected in the brief filed in the *Mutual Aid Renewal* case before the Civil Aeronautics Board on behalf of six unions including the IAM and TWU.²⁰ The brief very persuasively argues that the five airlines which were struck in 1966, would have been better off not to have bothered with bargaining at all, and should have merely accepted the IAM's original demands.

¹⁸ I have borrowed here from my colleague, Kenneth L. Meinen, who used a similar figure in an excellent speech. Speech by Kenneth L. Meinen, Connecticut General Flight Forum, "Aviation and the Public Interest: The Dynamic New Dimensions," Dec. 8, 1966.

¹⁹ LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND*, Ch. V, at 65.

²⁰ Brief on Behalf of Six Union Parties to Examiner Arthur S. Present, C.A.B. Doc. No. 9977 (Renewal) (Dec. 20, 1968).

Whether this is an implied threat that, if the carriers insist on wasting time by bargaining, the unions will have their revenge, I do not know, but here is what the brief says:

Reference to Carrier Exhibit No. 31 shows that more than two-thirds of the claimed past losses of the Mutual Aid carriers from strikes resulted from the disputes on Eastern, National, Northwest, Trans World and United with the IAM in the summer of 1966. It is perfectly clear that the decision to undergo this strike cost the carriers involved substantially a greater sum of money than if they had accepted the original union demands without any strike *or indeed without any negotiations of any kind*. Six Unions Joint Rebuttal Exhibit No. 13, a Board study, states that the total loss of net income during the strike for the five struck carriers is estimated at \$103 million. To this figure must be added the cost of the settlement which Carrier Exhibit No. 26 (page 16) estimates at \$85,700,000. Thus, the total cost to the carriers of the strike and the settlement was \$188,700,000. On the other hand, the carriers value the original union demands prior to any negotiations thereon at \$114 million (Carrier Exhibit No. 26, page 4). Thus, the carriers involved would have been better off in the amount of \$74,700,000 if they had accepted the original union proposal without a strike *or indeed without any negotiations at all*.²¹ [Emphasis added; footnote omitted.]

The lesson from the foregoing is clear: The airlines are foolish to give greater weight to government requests than to union demands. They should simply capitulate, regardless of the public interest. However, this position of the unions may be short sighted. As Edmund Burke said:

Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites . . . Society cannot exist unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters.²²

The Fifth Amendment of the Constitution guarantees that no person ". . . shall be . . . deprived of . . . property, without due process of law." Yet I can think of no procedure sanctioned by law that results in a more direct taking of property from the public, and with such an obvious lack of due process, than transportation strikes. When such a strike occurs, the public loses, first, the use of common carriage facilities, the cost of which may have been contributed largely by the public, second, the confirmed reservations and contracts of carriage which have been made, and, third, the increased fares the public inevitably has to pay. Who can doubt that the practice of blockading a public highway to enforce the demands of a minority group could not be sustained. Yet we now have a collective bargaining practice which encourages a union to deprive the public of its common carriage facilities to enforce union demands. One wonders why the public may not be deprived of the use of its facilities and property in one case, but may be deprived of them in the other.

²¹ *Id.* at 31-32.

²² As quoted in an editorial by James Reston, New York Times, Jan. 15, 1969, at 46.

IV. WHAT ARE THE CHANCES FOR TRANSPORTATION STRIKE CONTROL LEGISLATION?

In coming to the question of what chances there might be for transportation strike control legislation, I immediately disclaim any political expertise. Speaking as one nurtured in the democratic tradition, however, my conviction is that the public will not be denied correction in a system which adversely affects so many of its members. The increasing public sentiment in favor of such legislation is indicated by recent polls.²³ And that there is a need for a correction seems indisputable. As long ago as 1952, the National Mediation Board said:

The present situation, if it continues, can result only in a complete breakdown of the machinery for the settlement of wage and rules disputes which was so carefully and hopefully constructed by the legislators and sponsors of the Railway Labor Act in 1926.²⁴

In 1961, W. Willard Wirtz said in a speech:

There is reason to suspect that the same thing may be happening to the concept of force in the labor relations field as in the international arena, that the destructive power of the available force has become too great for it to be used freely and fully. The strike and the lockout, like the force of arms in international relations, may continue to be regarded as effective in comparatively small, limited disputes. But the big strike, the big lockout, covering a whole, vital industry, may well be moving into much the same position as the atom bomb.²⁵

In his State of the Union Message on January 12, 1966, President Johnson made the following statement in connection with the New York City transit strike:

I also intend to ask the Congress to consider measures which, without improperly invading state and local authority, will enable us to effectively deal with strikes which threaten irreparable damage to the national interest.²⁶

Shortly thereafter Plato E. Papps, the General Counsel of the IAM, made this statement in a speech before the American Management Association:

One final topic upon which I'll touch, is "national emergency" disputes and the collective bargaining process. Such obvious things as transportation—air, rail and truck—I'll leave to your imagination because I don't believe that the Congress will again tolerate what recently transpired in New York. In fact, there are already several bills in the hopper which will try to meet this problem.²⁷

One of the original architects of the New Deal, Samuel I. Rosenman, recently came out in favor of such legislation. He said:

I urge that the time has now come, at least in those industries where a strike would cause an emergency, to adopt a bill along the lines of S.176, and to substitute the reason and considered judgment of the courtroom for

²³ See Wischart, *supra* note 1, at 1698, n.6.

²⁴ 17 NMB Ann. Rep. 33 (1951).

²⁵ From a speech in Chicago by W. Willard Wirtz, Aug. 3, 1961.

²⁶ New York Times, Jan. 13, 1966, at 13.

²⁷ American Management Association News, Feb. 11, 1966, at 6.

a verdict based only on comparative strength and resources. Giving up rights like the right to strike—and even more ancient rights—for the general good and welfare of the community—is nothing new in civilized countries.²⁸

On January 16, 1969, Secretary of Labor Shultz told the Senate Labor Committee that, although he would be "very careful about recommending any legislation" which might have the effect of "destroying collective bargaining in areas where it's working well and most collective bargaining in this country is working well," he also said that "I'd like to see the situation under the Railway Labor Act improve."²⁹ And subsequently President Nixon said, responding to a question about the dock strike:

Now, long range, I believe that the Taft-Hartley Act's provisions for national emergency strikes, which I helped to write along with other members of the Labor Committee 20 years ago, that those provisions are now outmoded. I do not believe we have enough options in dealing with these kinds of disputes and breakdowns. I have, therefore, asked the Department of Labor to develop some new approaches in this field, and we will submit them by legislation to this Congress.³⁰

V. CONCLUSION: A PROPOSAL

It seems only a question of time until the foregoing sentiments are expressed in the form of legislation. Meanwhile, those of us who are deeply interested in collective bargaining are presented with a great opportunity.

The opportunity is to see whether those techniques which are so useful in collective bargaining cannot be used to compromise differences and develop a legislative proposal which has the support of both management and labor. The spirit of innovation and cooperation which made the Railway Labor Act possible in 1926, and successful for so many years, is not dead in this country. We all know that there are honorable men of good will, ability, and high patriotism on both sides of the bargaining table. When the Railway Labor Act was agreed upon, far more important than the specific words was the commitment of labor and management. It is understandable that the commitment would become obscured after forty years. But, once having been reminded of it, both sides should be able to work together for a statesmanlike solution to the strike problem. Time and effort spent in this way would be much more satisfying than public fault-finding about various proposed solutions.

Such an approach, as in Sweden, may obviate the need for legislation through the establishment of extra-statutory procedures. Or, as in the case of the Railway Labor Act, it could result in a legislative proposal which has the joint support of labor and management. Either alternative, it seems to me, would be preferable to the risk of legislation, possibly composed in the heat of some crisis, which may not be in tune with the interests of either management or labor.

²⁸ Statement in favor of S. 176, 90th Cong., 1st Sess., Oct. 17, 1967, published in 23 Record of Assn. of the Bar of the City of New York 33, 64-65 (1968).

²⁹ Wall Street Journal, Jan. 17, 1969, at 6.

³⁰ President's News Conference of Feb. 6, 1969, Weekly Compilation of Presidential Documents, Feb. 10, 1969, at 229; Legislative Status Report, Feb. 7-14, 1969.

Out of this conference may grow a continuing dialogue between labor and management, and I hope it does. I can only echo the thoughts expressed by Plato E. Papps, General Counsel of the IAM, in a speech in 1966:

Certainly, as many of us recognize, our labor laws are antiquated. They are not designed to meet this problem [of emergency strikes] and of course, this failing in our law magnifies the problem even more because there is no remedial solution available to accommodate and meet the needs of the parties at the bargaining table who may be subject to this type of dispute or the protection of the public interest.

This I do know, that if such disputes are to be avoided or averted, *something* is required. There are those on both sides of the table who favor either all, or some, of the more commonly discussed methods of dealing with such disputes. And there are others who say: 'leave us alone and we'll settle the problem in our own way', depending of course, on whose side the bread happens to be buttered at the time.

Whatever the answer may be, it will not be solved unless and until all sides—labor, management, and the public—consider the problem in a statesmanlike manner and with due deliberation reach a solution sufficiently flexible and accommodating to meet the needs of the particular dispute and the public interest. Whatever the answer may be, I think that the sooner we face up to the problem, the sooner we may find a formula—let's get on with it!³¹

If that is an offer, I accept it. Are there any others? We are at the moment of decision. This conference can either join the "innumerable caravan" of those whose proceedings are duly and dully recorded in books which gather dust on library shelves,³² or it can become an event of transcendent importance, to be recorded in future labor histories as the beginning of a bipartisan movement leading to the solution of transportation strikes. Let's choose the latter course.

³¹ Speech by Plato E. Papps, American Management Assoc. News, Feb. 11, 1966, at 6.

³² "So live, that when the summons comes to join

The innumerable caravan, which moves

To that mysterious realm, where each shall take

His chamber in the silent halls of death" — BRYANT, *THANATOPSIS*.